80-1780

Office-Supreme Court, U.S.
FILED
APR 13 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1981

PHILIP J. SCHWENK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Douglas W. Thomson
DOUGLAS W. THOMSON
LAW FIRM
Suite 1530
55 East Fifth Street
Saint Paul, Minnesota 55101
(612) 227-0856

Counsel for Petitioner

QUESTION PRESENTED

Whether Petitioner's due process rights under the Fourteenth Amendment were violated when the government did not sustain its burden of proving beyond a reasonable doubt that Petitioner was guilty of failing to file federal income tax returns.

TABLE OF CONTENTS

	Page
Opinions	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutory Provision	3
Statement	4
Reason for Granting Certiorari	6
Conclusion	12
Appendix	A-1

CITATIONS

	Page(s)
CONSTITUTION:	
Amendment XIV	3
CASES:	
Bronston v. United States, 409 U.S. 352 (1973)	9
Coffin v. United States, 156 U.S. 432, 453 (1895).....	8
Glasser v. United States, 315 U.S. 60, 89 (1942)	9
In Re Winship, 397 U.S. 358 (1970).....	7
Jackson v. Virginia, 443 U.S. 307, 317 (1979).....	9, 11
Johnson v. Louisiana, 406 U.S. 356, 362 (1972)	10
U.S. v. Bishop, 412 U.S. 346 (1976)	11
United States v. Pomponio, 429 U.S. 10 (1976)	11
STATUTES:	
26 U.S.C. §7203	3, 5
26 U.S.C. §7206	11

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

OCTOBER TERM, 1981

PHILIP J. SCHWENK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The Petitioner, Philip J. Schwenk, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The slip opinion is found in the

Appendix. The District Court filed no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1981. A petition for rehearing was denied on March 13, 1981. (The order denying the rehearing is included in the Appendix). This petition is filed within thirty days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. §1254. The District Court's jurisdiction was invoked by indictment.

QUESTION PRESENTED

Whether Petitioner's due process rights under the Fourteenth Amendment were violated when the government did not sustain its burden of proving beyond a reasonable doubt that Petitioner was guilty of failing to file federal income tax returns.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISION

26 U.S.C. §7203:

Any person required under this title to pay any estimated tax or taxes, or required

by this title or by regulations made under authority thereof to make a return (other than a return required under authority of §6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or taxes, make such a return, keep such records or supply such information at the time or times required by law or regulations shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

STATEMENT

The evidence of the challenged conviction appears briefly in the opinion of the Eighth Circuit attached in the appendix hereto. To

avoid needless prolixity, set forth below are only the facts pertinent to the specific issues raised in this petition. Petitioner was indicted with four counts of failing to file income tax returns for the years 1973, 1974, 1975 and 1976, in violation of 26 U.S.C. §7203. After extensive jury deliberation, Petitioner was convicted on the counts relating to 1975 and 1976.

The evidence at trial was introduced regarding Petitioner's limited formal education, disorganized and incomplete financial records, demanding occupations of farming, crop dusting, and chemical sales, and a heavy responsibility for providing for his wife and eight children. As a result of these domestic and business pressures, Petitioner neglected to file his

income tax returns.

On appeal to the Eighth Circuit, Petitioner argued the evidence presented did not support the jury's finding of willful intent. The Eighth Circuit disagreed, holding that Petitioner's failure to file income tax returns was a conscious decision not to comply with the requirements of the Internal Revenue Code. slip op. page 3. The Circuit Court also noted Petitioner's defense of a bona fide misunderstanding as to his duty to make a return was not believed by the jury and that as a result, the jury's verdict would not be disturbed.

REASON FOR GRANTING CERTIORARI

The decision of the Eighth Circuit Court of Appeals was contrary to the due process clause of the Fourteenth Amendment. The Circuit

Court affirmed Petitioner's convictions where, on the record, the convictions were not supported by substantial evidence.

In Re Winship, 397 U.S. 358 (1970), this Court reversed a New York Court decision which has held a juvenile charged with a crime could be found guilty by a mere preponderance of the evidence. 397 U.S. at 360. This Court found the standard of proof beyond a reasonable doubt applied to juvenile hearings as well. This Court reaffirmed its dedication to the historical standard of proof used in criminal trials.

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete

> substance for the presumption of innocence -- that Bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

397 U.S. at 363 quoting Coffin v. United States, 156 U.S. 432, 453 (1895)

This Court justified the reasonable doubt standard:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immence importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. According, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is

> reasonable doubt about his guilt. In Re Winship, 397 U.S. at 363-364.

Even with the reasonable doubt standard, there are instances, unfortunately, when an innocent party is convicted of a crime.

> [A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt... In a Federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction.

Jackson v. Virginia, 443 U.S. 307, 317 (1979); Glasser v. United States, 315 U.S. 60, 80 (1942); Bronston v. United States, 409 U.S. 352 (1973)

This Court's inquiry on review on claims of sufficiency "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. at 319; Johnson v. Louisiana, 406 U.S. 356, 362 (1972)

Petition was found guilty where the evidence presented at trial failed, by any reasonable interpretation, to support the verdict. This is not a case of a scheming individual, who, with deliberate calculation, decided to evade the filing requirements of the Internal Revenue Code. Nor is this a case where the individual has so much income and therefore taxes due and owing, that he does not file for evasion purposes. And this is not a case where the individual tries, through manipulative accounting procedures, to somehow defeat his obligations to pay taxes.

This is the case of an individual who had no taxes due and owing for the years 1975 and 1976. Petitioner failed to file through neglect

and ignorance and because of the pressures of extraordinary financial obligations. There is an absence of intent here normally seen in failing to file cases.

In United States v. Pomponio, 429 U.S. 10 (1976), this Court held that willfully as used in 26 U.S.C. §7206 "simply means a voluntary, intentional violation of a known legal duty." 429 U.S. at 12; See also U.S. vs. Bishop, 412 U.S. 346 (1976).

The intent evidence of a "voluntary intentional violation" of the filing requirements is clearly lacking on the record. This Court has recognized that a jury may occasionally convict where "no rational tryer of fact could find guilt." Jackson vs. Virginia, supra, 443 U.S. at 319. Such is the case with the Petitioner.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

DOUGLAS W. THOMSON
LAW FIRM

By _____
DOUGLAS W. THOMSON
Suite 1530
55 East Fifth Street
St. Paul, Minnesota 55101
(612) 227-0856

Counsel for Petitioner

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1929

United States of America,	*	
	*	
Appellee,	*	Appeal from
	*	the United
v.	*	States District
	*	Court, District
Philip J. Schwenk,	*	of Minnesota
	*	
Appellant.	*	

Submitted: February 11, 1981
Filed: February 19, 1981

Before ROSS, HENLEY and MCMILLIAN, Circuit Judges.

PER CURIAM.

Philip J. Schwenk appeals from the judgment of the district court[1] convicting

---

[1] The Honorable Harry H. MacLaughlin, United States District Judge for the District of Minnesota.

him of two counts of willful failure to file income tax returns for tax years 1975 and 1976 in violation of 26 U.S.C. § 7203. He was sentenced to one year imprisonment and fined $10,000.00 on one count and received a $10,000.00 fine and a suspended one year term of imprisonment on the other count. Appellant was also sentenced to three years probation following his imprisonment. We affirm the conviction on both counts.

On appeal, Schwenk concedes that the government established that he was required to file returns for 1975 and 1976 and failed to do so. He contends, however, that the evidence was insufficient to prove that he willfully failed to file the required returns. Appellant rests this contention on two grounds: (1) that the evidence fails to establish

the element of willfulness and (2) acquittal on two counts negate a finding of intent on the remaining counts.[2]

At trial, Schwenk raised the defense that he acted through negligence and careless disregard rather than willfulness. After introducing evidence of appellant's limited formal education, disorganized and incomplete financial records, demanding occupations of farming, crop dusting, and chemical sales, and heavy responsibility of providing for his wife and eight children, the defense argued to the jury that these domestic and business pressures

---

[2] Schwenk was charged with four counts of failing to file income tax returns for 1973, 1974, 1975 and 1976. After a jury trial, he was acquitted on the counts relating to 1973 and 1974 and convicted on the two remaining counts.

pressures caused this inadvertent failure to file income tax returns. On appeal, Schwenk argues that this careless disregard of his duty to file cannot be equated with the deliberate and intentional failure to file needed to establish willfulness.

This Court has held that to establish willfuness the government is not required to "prove anything beyond establishing that defendant's action was deliberate, intentional and without justifiable excuse, or otherwise stated, a voluntary, intentional violation of a known legal duty." United States v. Francisco, 614 F.2d 617, 618 (8th Cir. 1980); United States v. Rifen, 557 F.2d 1111, 1113 (8th Cir. 1978); United States v. Pohlman, 522 F.2d 974, 977 (8th Cir. 1975) (en banc),

cert denied, 423 U.S. 1049 (1976), cited with approval in United States v. Pomponio, 429 U.S. 10, 12-13 (1976). The court also has recognized that "a careless or reckless disregard does not elevate a defendant's conduct to 'wilful' as that term is employed in §7203." United States v. Bengimina, 499 F.2d 117, 119 (8th Cir. 1974). The evidence in the instant case, however, clearly establishes that Schwenk's failure to file resulted from a deliberate, intentional decision not to file any returns. Appellant's failure to file for four consecutive years is strong evidence that suggests a pattern of intentional conduct rather than inadvertence. Schwenk did not file returns for tax years 1973 through 1976 until January, 1979, thirteen months after the Internal

Revenue Service began an investigation of his failure to file. In addition, Paul A. Wheeler, a criminal investigator for the Internal Revenue Service, and William Skoglund, a friend of appellant who prepared the late returns, testified that appellant admitted he knew he should have filed returns for the years in question. Further, Helen Jensen, whom Schwenk hired to organize his income expense records in 1975, testified that Schwenk stated that he did not file returns because "he had a large family, he didn't feel he had much of an income, and he didn't think that the government was going to tell him what to do."

Appellant offers may reasons for his failure to file, but these reasons are irrelevant under section 7203 because the prosecution established

that he made a conscious decision not to comply with the requirements of the law. See United States v. Matosky, 421 F.2d 410, 413 (7th Cir.), cert. denied, 398 U.S. 904 (1970). Since Schwenk failed to show inadvertent or negligent conduct, only a bona fide misunderstanding about his duty to make a return would constitute a justifiable excuse for his failure to file. See United States v. McCorkle, 511 F.2d 482, 486 (7th Cir.) (en banc), cert. denied, 423 U.S. 826 (1975); United States v. Matosky, supra, 421 F.2d at 413. Appellant raised the defense of good faith misunderstanding of the law by presenting evidence showing that he was unaware that he could file returns without paying any tax due at the time of filing. It is apparent, however, that the jury did not believe

this assertion and it was not required to do so.

Finally, appellant argues that because his acquittal for failing to file in 1973 and 1974 was based on the same evidence that led to his conviction for the other years, the jury's inconsistent verdicts negate the finding that he willfully failed to file returns for 1975 and 1976. First, the court notes and appellant acknowledges the general rule in this circuit that "consistency between the verdicts on a multiple-count indictment is unnecessary when a defendant is convicted on one or more counts but acquitted on the remainder." United States v. West, 549 F.2d 545, 553 (8th Cir.), cert. denied, 430 U.S. 956 (1977). More important, the evidence leading to Schwenk's conviction for 1975 and 1976

differs materially from the evidence presented for tax years 1973 and 1974. Schwenk reported losses for 1975 and 1976 and therefore did not owe any taxes. By appellant's own figures on his late returns for 1973 and 1974, however, he owed $5,261.00 in taxes for 1973 and $21,281.00 for 1974. He contends the jury acquitted him of the charges relating to 1973 and 1974 because it necessarily believed his defense of good faith misunderstanding that he was required to pay taxes due when he filed but was unable to do so. In light of evidence that Schwenk had $6,985.00 in his checking account on April 15, 1974 and $12,000.00 on the following day and a balance of $23,000.00 on April 11, 1975, this contention is not airtight. While the

jury could have accepted his defense for years when he owed substantial amounts in taxes, it reasonably could have disbelieved the defense for the two years when he had no tax liability. See United States v. McCorkle, supra, 511 F.2d at 486. Thus, in the circumstances of this case, acquittal for failing to file for the 1973 and 1974 tax years does not negate a finding of willfulness for 1975 and 1976 because the evidence supporting conviction differs from the evidence resulting in acquittal. See United States v. Williams, 470 F.2d 915, 918-19 (2d Cir. 1972); Batsell v. United States, 403 F.2d 395, 400 (8th Cir. 1968), cert. denied, 393 U.S. 1094 (1969)

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1929 September Term, 1980

United States of America, Appellee,	)	Appeal from the United States District Court, District of Minnesota
vs.	)	
Philip J. Schwenk, Appellant.	)	

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby denied.

And it is further ordered by the Court that appellant's request for stay of mandate is denied.

March 13, 1981